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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANNY FERNANDEZ, Defendant and Appellant.	B173046 (Los Angeles County Super. Ct. No. KA062765)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Grant Nelson, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and William H. Davis, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Danny Fernandez pleaded no contest to one count of dissuading a witness in violation of Penal Code[1] section 136.1, subdivision (c)(1). The trial court sentenced him to the low term of two years as the base term, which was doubled to four years pursuant to the three strikes law.[2] (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).)

Appellant appeals on the ground that his state and federal constitutional rights to due process and to the assistance of counsel were violated by the trial court's failure to hold a hearing on appellant's motion to withdraw his plea, or to hold a hearing on his motions for reconsideration.

FACTS[3]

On July 14, 2003, Carlos Marquez, who was dating appellant's mother, was leaving his driveway when he was approached by appellant's wife. She told Marquez she wanted to talk, but Marquez drove away. Marquez drove to a shopping center and got out of his car. Appellant approached him and told him not to go and testify, or things would not look very good for Marquez or his family. Marquez was planning to testify about an incident in which he was beaten and his property was stolen. Marquez had identified appellant's brother Jerry as one of his attackers. Appellant told Marquez he would give him back his property and also give him some money. Marquez told appellant to leave. While speaking with Marquez, appellant placed his right hand in his pocket. Appellant left, and Marquez called the police.

DISCUSSION

I. Appellant's Argument

Appellant complains that he was denied his state and federal constitutional rights to due process and to assistance of counsel by the trial court's summary denials of his

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1 All further references to statutes are to the Penal Code unless stated otherwise.

2 The information alleged appellant suffered a 1994 conviction for robbery (§ 211).

3 Due to appellant's no contest plea, the facts are taken from the preliminary hearing transcript of August 8, 2003.

motions, the failure to appoint counsel for appellant, and the failure to hold hearings on the motions.

II. Proceedings Below

On October 17, 2003, appellant pleaded no contest to one count of violating section 136.1, subdivision (c)(1). The plea agreement called for the low term sentence of two years doubled to four years because of appellant's prior strike offense.

On December 11, 2003, appellant signed a handwritten notice of appeal in which he stated he wished to appeal from the sentence and withdraw his plea. The court construed this document as a motion to withdraw the plea and, on December 19, 2003, the court denied the motion. On January 2, 2004, the court considered appellant's motion for reconsideration of the request to withdraw the plea, and the court denied the motion.

On January 12, 2004, appellant filed a notice of appeal with a request for a certificate of probable cause. The notice of appeal stated that the appeal was based on the sentence or other matters occurring after the plea and also that the appeal challenged the validity of the plea. On January 29, 2004, the court denied the request for a certificate of probable cause.

On January 13, 2004, appellant filed a motion for reconsideration of his request to withdraw his plea. On January 16, 2004, appellant filed another motion for reconsideration of his motion to withdraw his plea. On January 16, 2004, the court denied appellant's motion for reconsideration. On January 26, 2004, appellant filed a request for an explanation regarding the court's denial of his motion for reconsideration, and the court denied the request.

On July 19, 2004, after appellant's notice of appeal was filed, a hearing was held on his motion to withdraw the plea. Appellant testified at the hearing. The court denied the motion.[4]

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[4] Respondent argues that appellant's claims are moot because of the July 2004 hearing, and appellant responds that the trial court had no jurisdiction to decide the

III. Trial Court Did Not Abuse its Discretion or Violate Appellant's Constitutional Rights

We conclude the court did not violate appellant's constitutional rights by not holding a hearing and not appointing counsel to represent him for his motions.

A. First "Notice of Appeal"

At the outset, we conclude the trial court properly construed the first notice of appeal as a motion to withdraw the guilty plea. Since appellant had been convicted by plea, he was required to file the statement seeking a certificate of probable cause as required by section 1237.5[5] along with his December 11, 2003, notice of appeal if he attacked the validity of his plea. The "notice of appeal" that appellant signed on December 11 stated that "defendant Danny Fernandez appeals from the sentencing imposed by the Pomona Superior Court pursuant to a plea agreement, which the defendant wishes to withdraw, given the factual errors and misrepresentations made in this action, all made with the intent to mislead the defendant." Clearly, even though appellant claimed to appeal from sentencing, the gist of appellant's words was an attack on the validity of the plea. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76 [courts must determine whether a challenge to the sentence is in substance a challenge to the validity of the plea].) Because appellant's filing did not satisfy the requirements of section 1237.5, his appeal was inoperative. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1088; Cal. Rules of Court, rule 30(b).) But the trial court appears to have granted

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claims, since appellant had already filed an appeal. Because we address the merits of appellant's claims on appeal, we need not reach the jurisdictional issue.

[5] Section 1237.5 provides that, "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

appellant the benefit of the doubt by construing the "notice of appeal" as a motion to withdraw the plea. Moreover, appellant stated that he wished to withdraw the plea.

B. Standard of Review

In reviewing a trial court's ruling on a (postjudgment) motion to withdraw a guilty plea, an appellate court must not disturb the trial judge's decision unless an abuse of discretion is clearly demonstrated. (*People v. Harvey* (1984) 151 Cal.App.3d 660, 666-667.)

C. Relevant Authority on Postjudgment Motions to Withdraw Pleas

We observe that section 1018 does not authorize bringing a motion to withdraw a plea after judgment has been entered, but rather only before that event.[6] (§ 1018.) In other words, one cannot withdraw a plea after judgment has been entered; the judgment must first be vacated. (See Cal. Criminal Law Practice Series: Appeals and Writs in Criminal Cases (Cont.Ed.Bar 2d ed. 2000) Writs in Cal. State Courts, §2.208, p. 566.) Thus, the superior court had jurisdiction only to entertain on the merits either a motion to vacate and withdraw the plea, or its common law writ equivalent in this case, a petition for error coram nobis. (See, e.g., *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1616-1618 (*Castaneda*), and cases cited; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 182, p. 210; Cal. Criminal Law Practice Series: Appeals and Writs in Criminal Cases, *supra*, Writs in Cal. State Courts, §§2.6, 2.207, pp. 350, 565.)

"In this state *coram nobis* is a limited remedy of narrow scope which is available (where no other remedy exists) to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. [Citation.] The writ lies to correct only errors of fact as distinguished from errors of law. [Citation.]" (*People v. Sharp* (1958) 157 Cal.App.2d 205, 207.) "The lack of

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[6] Under section 1018, the trial court may, on application of the defendant at any time before judgment and for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

counsel or effective aid of counsel are not properly raised by a petition for a writ of error *coram nobis*. [Citations.]" (*Id*. at p. 208.) "The most critical point is substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state. Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even willfully false statements of factual matters by his attorney suffice." (*People v. Gilbert* (1944) 25 Cal.2d 422, 443.)

D. Claims in Appellant's Motions Were Without Merit

Appellant's arguments in support of his motion may be summarized as follows: (1) defense counsel and the district attorney misinformed him on the number of years he faced if he went to trial, and he was pressured to enter into a plea agreement; (2) defense counsel failed to notice a *Romero*[7] hearing with regard to appellant's strike conviction; (3) counsel misrepresented to appellant that his plea agreement would not result in a strike; and (4) appellant had a meritorious defense, but counsel failed to inform the court of appellant's intention to go to trial based on this defense.

Clearly, these contentions do not show that some fact existed that was not presented to the trial court through no fault of appellant's. Furthermore, the ineffectiveness of counsel was not properly raised in this context. (*People v. Sharp*, *supra*, 157 Cal.App.2d at p. 207.) Moreover, all of appellant's contentions were belied by the record of the taking of the plea, which was available to the court denying the motion, and which we may presume was considered by the court. (*People v. Visciotti* (1992) 2 Cal.4th 1, 49 ["In the absence of any indication to the contrary we presume, as we must, that a judicial duty is regularly performed. (Evid. Code, § 664 . . . .)"].)

The record shows that, although there was initially some confusion about whether the current offense was a strike, everyone agreed that it was a strike. When appellant asked if he would be "sitting on two strikes now" his counsel replied that "after this

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[7] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

conviction, you will be, I guess, as you termed it sitting on two strikes which means you will have a third strike after this conviction which means you shouldn't commit any future felonies." Appellant was informed that his maximum sentence was the high term of four years doubled to eight years, and not the 13 years as originally thought. With respect to a *Romero* motion, in the context of a plea agreement appellant had no right to any consideration to further reduce his sentence.

E. No Hearing Required

Given the lack of merit in appellant's contentions, we conclude there was no abuse of discretion or due process violation in the trial court's denial of the motion and requests for reconsideration without an evidentiary hearing. Appellant cites no authority in support of his claim, apart from cases describing general principles of due process. *Johnson v. Superior Court* (1981) 121 Cal.App.3d 115, cited by appellant, states that section 1018 requires that the actual withdrawal of the guilty plea must be made by the defendant himself in open court. That case does not state that the motion requires an evidentiary hearing. (*Id*. at pp. 117-119.)

In *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183 (*Zamudio*), for example, the defendant was allowed to withdraw his guilty plea pursuant to section 1016.5, which allows a defendant to seek to vacate his plea if he was improperly advised about the possible immigration consequences of his conviction. (*Zamudio*, *supra*, at pp. 190, 192.) During the hearing on the motion, the trial court denied the People's request for an evidentiary hearing on the questions of whether the defendant would have pleaded no contest if he had been properly advised and when he had acquired actual knowledge of the adverse immigration consequences of his plea. (*Id*. at p. 200.) One of the grounds on which the People petitioned for relief was the failure to hold this further evidentiary hearing. (*Ibid*.)

Zamudio stated that it was not persuaded the trial court abused its discretion by ruling on the basis of the record before it, which included the parties' written submissions. (*Zamudio*, *supra*, at p. 201.) The court stated, "'There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion

proceeding, by resolving evidentiary conflicts without hearing live testimony.' [Citation.] [¶] Petitioner cites no authority specifically requiring courts to hold live evidentiary hearings on section 1016.5 motions or, more generally, on plea withdrawal motions. On the other hand, California law affords numerous examples of a trial court's authority, in ruling upon motions, to resolve evidentiary disputes without resorting to live testimony." (*Ibid*.) The court went on to cite statutory and case law allowing for rulings without evidentiary hearings in motions for continuance, new trial motions, motions to disqualify a trial judge, and motions to vacate judgment. (*Ibid*.) *Zamudio* concluded that the court did not err. (*Ibid*)

We conclude the court did not err or abuse its discretion in the instant case, whether appellant's various moving papers are labeled as motions to withdraw a plea or petitions for writ of error coram nobis. There was no due process violation when the court ruled that appellant had not stated any grounds to allow him to withdraw his plea based on his written motions.

F. Appointment of Counsel Not Required

We also do not perceive that the trial court erred in not appointing counsel or that the court violated appellant's right to due process and to the assistance of counsel. As stated in *People v. Shipman* (1965) 62 Cal.2d 226, "it will often be readily apparent from the petition and the court's own records that a petition for *coram nobis* is without merit and should therefore be summarily denied. When, however, facts have been alleged with sufficient particularity [citation] to show that there are substantial legal or factual issues on which availability of the writ turns, the court must set the matter for hearing. These issues may be decided on the basis of memoranda of points and authorities, affidavits, and other written reports. If the court deems additional procedures necessary to a correct determination of the issues, it may also require the presence of petitioner and other witnesses, and conduct the hearing like an ordinary trial. [Citations.] Neither the United States Constitution nor California law, however, requires that the hearing be conducted as a formal trial. [Citations.]" (*Id*. at pp. 230-231.) In light of this procedural background, Shipman determined that "in the absence of adequate factual allegations stating a prima

facie case, counsel need not be appointed either in the trial court or on appeal from a summary denial of relief in that court." (*Id*. at p. 232.)

Thus, an indigent petitioner is entitled to have counsel appointed only when he has stated facts sufficient to satisfy the court that a hearing is required and his claim can no longer be treated as frivolous. Absent a prima facie showing, which we have concluded appellant failed to present, appellant had no constitutional right to the appointment of counsel to represent him in his motion to vacate the judgment. This same failure to state a prima facie case allows for the summary denial of his motions.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

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